

EXHIBIT 6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
:
ASHOT EGIАЗARYAN, :
:
Plaintiff, : 11-CV-02670 (PKC)
:
v. :
:
PETER ZALMAYEV, : 500 Pearl Street
:
Defendant. : New York, New York
:
-----X
August 24, 2012

TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE GABRIEL W. GORENSTEIN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: JONATHAN DANIEL LUPKIN, ESQ.
JASON TODD COHEN, ESQ.
Flemming Zulack Williamson
Zauderer, LLP
One Liberty Plaza
New York, New York 10006

For the Defendant: JAMES P. GOLDEN, ESQ.
Hamburg & Golden, P.C.
1601 Market Street, Suite 3310
Philadelphia, Pennsylvania 19103

ANDREW J. RYAN, ESQ.
Salisbury & Ryan, LLP
1325 Avenue of Americas
New York, New York 10019

JANE SILVER, ESQ.

Court Transcriber: RUTH ANN HAGER, C.E.T.**D-641
TypeWrite Word Processing Service
211 N. Milton Road
Saratoga Springs, New York 12866

Proceedings recorded by electronic sound recording,
transcript produced by transcription service

1 THE CLERK: Egiazaryan v. Zalmayev, docket number
2 11-CV-02670.

3 Counsel, please state your appearances for the
4 record.

5 MR. LUPKIN: Jonathan Lupkin from the firm of
6 Flemming Zulack Williamson Zauderer, LLP, on behalf of
7 Mr. Egiazaryan with my colleague Jason Cohen from the same
8 firm. Good morning.

9 MR. GOLDEN: Good morning, Your Honor. James Golden
10 from Hamburg & Golden for the defendant Peter Zalmayev.

11 MR. RYAN: Andrew Ryan also for the defendant Peter
12 Zalmayev from Salisbury & Ryan.

13 MS. SILVER: Jane Silver, also for defendant Peter
14 Zalmayev.

15 THE COURT: Okay. Welcome everyone. You can be
16 seated if you're not addressing the Court. We're here, I
17 think as I expressed in my order, to talk about relevance but
18 since it seemed to be fully briefed. I was going to talk
19 about the July 24th letter unless the parties weren't prepared
20 to talk about the requests in that letter.

21 Mr. Golden, are you prepared?

22 MR. GOLDEN: Yes, I am.

23 THE COURT: Mr. Lupkin, are you prepared?

24 MR. LUPKIN: Yes, I think. The July 24th letter
25 pertains to what?

1 THE COURT: The depositions of the BGR employees --

2 MR. LUPKIN: Yes.

3 THE COURT: -- and the documents.

4 MR. LUPKIN: Yes, I'm ready, Your Honor.

5 THE COURT: I figured you would be.

6 The thing I'm not going to talk about is the asylum
7 motion yet. I guess when I issued the -- my order about
8 relevance, I guess I had some hope that it was going to change
9 the scope of discovery in this case, but it seems to me that
10 if the defendant has to prove a lack of good-faith basis for
11 the suit, I'm not sure how I can avoid the conclusion that
12 that would necessarily involve the merits of the case.

13 Mr. Lupkin, is there any -- I mean, do you have any
14 other ideas on this?

15 MR. LUPKIN: Yes, I do, Your Honor. Couple of
16 things. The issue -- the only issue that is before the Court
17 is this last statute, as you know. And in order to make that
18 showing, there has to be a showing that we lack a substantial
19 basis to bring a defamation claim. Defamation only has five
20 elements: it's a -- you know, a statement of fact that it's
21 false; that it was transmitted to a third party, in this case,
22 actual malice and damages. Applying that standard to this
23 case the question is whether Mr. Egiazaryan had a substantial
24 basis to claim that Mr. Zalmayev's publications of statements
25 that he was an anti-Semite, a war criminal with issues in

1 Chechnya and the diverter of funds in Chechnya is the only
2 question in the case. There's no longer an issue about is he
3 in the LDPR, is he not in the LDPR. The issue has been
4 substantially narrowed in my view and I don't believe that the
5 question of mere relevance is the inquiry.

6 Looking at the Federal Rules there's several things
7 that I'd just like to mention. First is --

8 THE COURT: Before we get to the Federal Rules, I
9 just want to understand what you just said.

10 So here Zalmayev has to show that Egiazaryan didn't
11 have a substantial basis for filing the various claims he did
12 in which he alleges that Zalmayev falsely called him an anti-
13 Semite and a member of this party and so forth. So whether
14 he's a member of this party or said anti-Semitic things and so
15 forth, how could that not be relevant?

16 MR. LUPKIN: The standard for the purposes of this
17 counterclaim is not whether or not we would have won a trial
18 or lost a trial. The only question that the Court has to
19 focus on is whether we had a substantial basis to bring it.
20 And simply --

21 THE COURT: But the substantial basis, that judgment
22 is based upon the actual evidence that was available to him as
23 of the time the suit was brought, right? That's --

24 MR. LUPKIN: And thereafter because --

25 THE COURT: Right. Or thereafter. Exactly. Now

1 you're expanding it even more. At the time the suit was
2 brought and to the extent it was pursued thereafter up until
3 the date Judge Castel dismissed it.

4 MR. LUPKIN: And my view is, one need look no
5 further than the defendant's testimony at his deposition to
6 reach the conclusion frankly. I know this is not a motion for
7 summary judgment, but we had a substantial basis. I asked him
8 a series of three questions. The first one was the following:
9 "Q. Let me ask you, are you aware of any anti-Semitic
10 statements made by Ashot Egiazaryan either in public or in
11 private?"

12 "A. No."

13 "Q. Are you aware of any vote cast by Ashot Egiazaryan while
14 he was in the Duma for any legislation that was anti-Semitic?"

15 "A. No."

16 "Q. Are you aware of Mr. Egiazaryan taking any positions that
17 were anti-Semitic?"

18 "A. No."

19 THE COURT: What does this have to do with anything?

20 MR. LUPKIN: It has to do with the fact that that
21 testimony alone substantiates the claim that there was a
22 substantial basis.

23 And there's another issue that I'd like to address
24 that goes more to the procedural --

25 THE COURT: Wait, wait, wait. Stop. I can't just

1 let that go. Isn't truth a defense to a defamation claim even
2 if the person didn't know it was true at the time?

3 MR. LUPKIN: I think that the evidence will show
4 based on the extinct -- the evidence we have already in front
5 of us that other than arguable affiliation with the LDPR there
6 was no evidence that Mr. Zalmayev had at the time --

7 THE COURT: Well, that's a different question. I
8 thought you were acting as if the defendant's knowledge was
9 the be-all and end-all of the defamation claim. It's
10 obviously not.

11 Look, I think -- I don't want to start getting into
12 the evidence because that wasn't the question I asked.

13 MR. LUPKIN: Let me also point out that one other
14 thing If I may, Judge. There has already been an enormous
15 amount of discovery in this case. We're not writing on a
16 clean slate, if you will. There have been an enormous number
17 of depositions. We have produced as the plaintiff over 13,000
18 pages of documents --

19 THE COURT: Okay. Now you're doing a different
20 point which I'm perhaps sympathetic to which has to do with
21 proportionality and we can get to that, but that wasn't my
22 question. My question was relevance.

23 I think -- I've read the letters on this and I think
24 I've heard enough. Is there some other point on my question,
25 Mr. Lupkin, you want to say? Anything else you want to say?

1 MR. LUPKIN: Yeah. I think that there's a
2 difference between the standard that used to apply here in
3 relevance which is reasonably calculated to lead to the
4 discovery of admissible evidence, but that changed. The
5 standard now is relevant to a claim or defense of a party
6 which is narrower.

7 THE COURT: Changed ten years ago but, yes, go
8 ahead.

9 MR. LUPKIN: Right. But the point is that that
10 yardstick is the yardstick that should be the yardstick used
11 in terms of analyzing either or not the variety of discovery
12 that Mr. Golden is seeking is relevant here in light of the
13 fact that everything but the --

14 THE COURT: Have I --

15 MR. LUPKIN: -- anti-Semitic claim --

16 THE COURT: -- used some other yardstick up until
17 today to your knowledge?

18 MR. LUPKIN: Explicitly or implicitly?

19 THE COURT: Either way. I asked you a question
20 about relevance and whether the dismissal of the main claim
21 changes the scope of relevance here. I've gotten a bunch of
22 irrelevant answers and now you're talking to me about a
23 standard of discovery that's been applicable at least ten
24 years implying that that's something new. I'm totally lost,
25 Mr. Lupkin. You need to hep me. If you have something else

1 to say on the topic I asked you about, which is the effect of
2 the dismissal on the scope of relevance, I'm happy to hear
3 you.

4 MR. LUPKIN: I'll sit down, Judge.

5 THE COURT: Okay. I don't -- I mean, at this point
6 I don't think that the subject here is -- of discovery has
7 changed. You know, notwithstanding that, I recognize I have
8 significant power to restrict the scope of discovery and it
9 may be that it affects the proportionality analysis under
10 26(b)(2)(C)(iii) which allows me to take into account not
11 merely the benefit and the burden, but also the needs of the
12 case and the amount in controversy and the importance of the
13 issues and the importance of the discovery. So perhaps it
14 will have some affect on that, but I'll have to do it on a
15 case-by-case basis or I should be more accurate and say on a
16 discovery request-by-discovery request basis.

17 So with that in mind, let me just turn to the July
18 24th letter. I'm not even sure I need argument from the
19 parties. I've got a number of letters in response. I have
20 letters dated July 30th, August 7th, August 14th. That's the
21 dates.

22 So I now look at the July 24th letter and look what
23 I'm being asked to do. And as to the first one -- I'm looking
24 at the conclusion -- "We request the Court to order the
25 depositions of Gabarra [Ph.] and Amsterdam to proceed on all

1 topics identified in the Hague requests."

2 So, you know, I looked at all the case law the
3 parties cited and all of that law involves considerations to
4 be waived or procedures to be undertaken by a court prior to
5 the issuance of a letter of request under the Hague
6 Convention. I didn't see a single case -- and someone can
7 tell me if I'm wrong -- that once a court has issued a letter
8 of request a court can then issue some additional order to a
9 foreign court regarding that request or the scope or anything
10 else. Did I miss something? Is there a case that does that?

11 MR. GOLDEN: Let me just check the names of the
12 case, Judge, but I think that cases cited in our letter --

13 THE COURT: Just give me a case that does it.

14 MR. GOLDEN: Metso Minerals.

15 THE COURT: Hold on. You're wrong on this one. I'm
16 not going to listen to any others, so I suggest you pick your
17 best one. Is this it?

18 MR. GOLDEN: That's all I have, Judge.

19 THE COURT: Citation is -- if you could give it to
20 me again since I'm on the computer right now.

21 MR. LUPKIN: Your Honor, it's 2007 Westlaw 1875560.

22 THE COURT: "Before the Court is a motion by the
23 defendants for the issuance of a letter of request," first
24 sentence. So I repeat what I said earlier. I don't think
25 I've ever seen a case where once a letter of request has been

1 issued there's some procedure or mechanism for a court to
2 issue an order to the foreign court. I don't think it's
3 appropriate. I think all of these issues should have been
4 raised, whatever they are, when the letter of request was
5 made. We very carefully checked to see if there was any
6 objection by the plaintiff and the request was issued, so
7 that's it.

8 If someone wants to -- if the person who requested
9 it wants me to vacate it, that would be the defendant, I will
10 talk about that and then we'll start the process all over
11 again with no promises, but in the absence of that request,
12 that's the end of it. I assume you're not making that
13 request, Mr. Golden. Am I right?

14 MR. GOLDEN: No, I'm not, but I would like to be
15 heard on that point.

16 THE COURT: Go ahead.

17 MR. GOLDEN: And our point is that I'm concerned
18 that the letter of request issued exactly as you said without
19 objection --

20 THE COURT: And drafted by you.

21 MR. GOLDEN: Yes.

22 THE COURT: Yes.

23 MR. GOLDEN: Without objection as to the documents
24 which was withdrawn.

25 My concern is, because of the statements made by the

1 plaintiff's counsel that when we get to London there will be
2 an attempt to litigate what was not litigated here, which is
3 the scope of the questioning. And because the form of the
4 letter of the request is not in order, although apparently to
5 Your Honor and I agree with Your Honor that it has the affect
6 of Your Honor's view about relevance. What we're asking is
7 for an order which we think will be more persuasive to a court
8 in London where Your Honor issues an order and you say that my
9 letters of request were issued under the following procedures
10 and it is my determination as the judge in the foreign court
11 that the scope of that discovery is appropriate for the case.

12 Now, I think that's implicit in Your Honor's letters
13 of requests, but my concern is that when we get to London
14 where they're a little fussier about things, they may not look
15 at that as an order. And I think that the reason why there
16 are no --

17 THE COURT: May not look at what as an order?

18 MR. GOLDEN: They will not look at the letters of
19 request --

20 THE COURT: Right. It's not an order; it's a
21 request.

22 MR. GOLDEN: Correct, correct. And I think that the
23 reason why there are no cases in which an order was issued
24 after the letters of request were issued is that objecting
25 parties made their objections in the United States so that it

1 was done. So we're looking for Your Honor's assistance to
2 confirm the letters of request because I think that will be
3 clearer and more persuasive to the London court in the event
4 that the plaintiffs object, which they have indicated to us
5 that they will, even though they haven't told us what the
6 basis of the objection was.

7 THE COURT: Request is denied for the reasons I
8 stated.

9 The letters from -- letter from defendant also made
10 reference to the possibility that some of the proposed
11 deponents may be located in the United States, though
12 apparently not in New York. And I would just note that I have
13 no subpoenas before me to anyone here and if they were
14 anywhere other than New York or within 100 miles, I don't
15 think I would have jurisdiction anyway so I don't think any of
16 that was relevant.

17 I think the next issue is the BGR documents. I --
18 you know, I'd like to try to enforce agreements between the
19 parties when they exist, but I'm a little concerned that the
20 agreement here might have had some ambiguity as to what's
21 being talked about. I mean, I can understand why documents
22 between BGR and the law firm might have been within the
23 original request, though I'm not, you know, 100 percent sure
24 about that, but I -- certainly if there were communications
25 between BGR and the plaintiffs on relevant topics, that's

1 your -- Golden -- Mr. Golden, your view is that was within the
2 agreement, too?

3 MR. GOLDEN: I'm sorry, Your Honor, I didn't
4 understand your --

5 THE COURT: Documents between BGR and the actual
6 plaintiff Mr. Egiazaryan or other entities.

7 MR. GOLDEN: That -- our position is is --

8 THE COURT: I'm sorry. Not you. Mr. Lupkin.

9 MR. LUPKIN: Yes. Your Honor, in his letter in
10 response to my August 7th letter, Mr. Golden acknowledged a
11 point that we made in our letter which is to say that
12 Mr. Egiazaryan produced the BGR documents under the Rule 34
13 concept of possession, custody and control. We had effective
14 control because we -- they worked for us and so, therefore, we
15 undertook together --

16 THE COURT: Wait, wait. "Us" meaning Egiazaryan.

17 MR. LUPKIN: "We," Egiazaryan un --

18 THE COURT: Not the firm. Maybe we need to
19 distinguish at some point but go ahead.

20 MR. LUPKIN: Sure. Mr. Egiazaryan undertook to
21 gather through his lawyers the documents that were in BGR's
22 possession, custody and control. There were documents that
23 were located in Washington and there were documents that were
24 located in London. I suppose we could have taken the position
25 that the documents too should have been obtained through

1 London but we didn't take that position. We took the position
2 that as the party we had an obligation to produce it and the
3 agreement that was entered into between Ms. Silver and I was
4 clear. It says, "The parties shall not have to log privileged
5 materials post the commencement of the litigation."

6 THE COURT: Right. But, you know, if -- there's a
7 reason people make those agreements and the reason is, if you
8 took document requests literally it would require every time
9 you wrote a memo to the file or your associate or did a draft
10 of the memorandum of law in this case, you'd have to log it.
11 That's why people have those agreements.

12 MR. LUPKIN: Right.

13 THE COURT: So I'm asking about something that seems
14 to me should be really outside the agreement, which would be
15 documents between -- if there are any -- between BGR and the
16 actual plaintiff, Egiazaryan, relating to pertinent topics.

17 MR. LUPKIN: There are none.

18 THE COURT: There are none. Okay. So we're now
19 talking about -- and I assume you don't mind saying that in
20 writing.

21 MR. LUPKIN: No.

22 THE COURT: Yes. Okay.

23 MR. LUPKIN: Yes, I don't mind saying it in writing.

24 THE COURT: Right. So that may lay to rest
25 something, but now the question is, BGR documents between --

1 are there BGR documents between you and your firm or members
2 of your firm. Is that what's -- what's out there that's not
3 being logged?

4 MR. LUPKIN: There are several categories: one is
5 communications between members and employees of my firm and
6 BGR; small number of internal communications within BGR that
7 reflect communications transmitted to them by our law firm;
8 and the third is a category of documents between BGR and an
9 individual by the name of Drew Holiner, who is
10 Mr. Egiazaryan's personal counsel, for lack of a better word.

11 THE COURT: Last name.

12 MR. LUPKIN: Holiner, H-O-L-I-N-E-R.

13 THE COURT: Okay.

14 MR. LUPKIN: He's a Russian advocate and a British
15 barrister.

16 THE COURT: Okay.

17 MR. LUPKIN: And he is sort of the quarterback, if
18 you will, for these various litigations. And he had post-
19 commencement of this litigation discussions with BGR about
20 issues pertaining to the litigation.

21 THE COURT: Okay. So let's talk about -- maybe we
22 can't talk about the subject matter of these documents, but my
23 problem is that, you know, when -- like I said, when people
24 make agreements of this kind it's to avoid production of
25 internal documents and documents between them and their

1 client. That's the purpose because it's a complete waste of
2 time because we know that they're all going to be work
3 product.

4 This -- you know, I don't know how clear it is that
5 documents between BGR and Holiner are work product. Your
6 firm, maybe that's a closer case.

7 MR. LUPKIN: Our firm was retained explicitly by
8 BGR --

9 THE COURT: For what purpose?

10 MR. LUPKIN: To act as their counsel to represent
11 them in connection with the subpoenas that were served.

12 THE COURT: Oh, well, then it does seem like we're
13 getting somewhere that's a waste of time.

14 Well, let me hear from Mr. Golden. Why isn't this a
15 waste of time?

16 MR. LUPKIN: And before --

17 THE COURT: Yeah.

18 MR. LUPKIN: Before I sit down -- well, I'll sit
19 down. Never mind.

20 THE COURT: Go ahead.

21 MR. GOLDEN: There are a number of aspects of this
22 and unfortunately, it's maybe more complicated than it ought
23 to be, but let me start with this.

24 At the time that the complaint was filed Flemming
25 Zulack did not have an attorney/client relationship with BGR.

1 I don't know when that occurred but it -- and perhaps -- the
2 time of that is relevant.

3 THE COURT: So let's just cut to the chase.
4 There -- for your point of view, whatever arguments made here
5 would only apply to the time when they were retained. When
6 were you retained. Do you know?

7 MR. LUPKIN: We have retainer letters dated the 6th
8 of September, so the retention occurred somewhere shortly
9 before that.

10 THE COURT: 2012.

11 MR. LUPKIN: 2011.

12 THE COURT: 2011.

13 MR. LUPKIN: September 6th.

14 THE COURT: Whatever documents between April -- I'm
15 sorry. Between April 2000 -- wait. When's your cutoff?

16 MR. GOLDEN: April 2011 is the complaint.

17 THE COURT: Okay. Are there documents between April
18 2011, September 2011 between your firm and BGR?

19 MR. LUPKIN: I don't know. I don't know offhand.

20 THE COURT: Okay. All right. So thank you. You
21 can be seated.

22 So to continue, Mr. Golden, I guess I see the
23 potential distinction between pre-September 6, 2011 and post-
24 September 6th, so why don't you discuss those in two separate
25 categories?

1 MR. GOLDEN: Right. And there's another variable
2 that applies to the communications between Flemming Zulack and
3 BGR. First, anything before September 6th or approximately
4 couldn't possibly be privileged by any -- by any test because
5 there wasn't an attorney/client relationship. After September
6 6th communications between Flemming Zulack and BGR, this is
7 not addressing the other categories but those communications,
8 fall into two categories: one is privileged; one is not
9 privileged.

10 The privilege is if there's a communication between
11 Flemming Zulack and BGR for the purpose of giving legal advice
12 to BGR that's a privileged document. Now, our position is, it
13 still has to be logged so we have a basis for determining what
14 we're talking about but that's a privileged document.

15 What's not privileged, even after September 6th, is
16 a communication between Flemming Zulack and BGR about Ashot
17 Egiazaryan. We had that dispute. We made a motion on that
18 category beginning on March 9th of this year. Egiazaryan
19 withdrew its assertion of privilege of that category of
20 documents and they were provided to us.

21 THE COURT: Wait, wait, wait. Those were documents
22 of Egiazaryan between him and BGR, right?

23 MR. GOLDEN: Well, they weren't between Egiazaryan.
24 Actually one of the interesting things having seen a couple of
25 thousand BGR documents is that Mr. Egiazaryan never

1 communicates with BGR.

2 THE COURT: Well, was it between his law firm --
3 this law firm and BGR?

4 MR. GOLDEN: It's -- many of them are -- I would say
5 if I had to pick the largest category they are in internal
6 communications with BGR. Sometimes there are copies sent to
7 other lawyers. There are a few that were sent to Mr. Lupkin
8 and Mr. Cohen. There are some that are sent to
9 Mr. Egiazaryan's other lawyers at Gibson Dunn & Crutcher.
10 There are many that are sent -- copies are sent or there are
11 communications with or references to this Drew Holiner. And a
12 good example -- this is one that was provided but so far is
13 subject to an attorney's-eyes-only designation, but this is a
14 good example of what we're talking about. This is an
15 exhibit --

16 THE COURT: This is in an open courtroom. Maybe we
17 should be circumspect in describing it.

18 MR. LUPKIN: May I propose the following just for
19 the sake of expediency? I don't see anybody else --

20 THE COURT: Well, we have a transcript that I have
21 no intention of sealing, so --

22 MR. LUPKIN: Well --

23 THE COURT: -- you have to think about the
24 transcript.

25 MR. LUPKIN: Let me ask you a question. When the

1 transcripts are posted on the ECF system we have an
2 opportunity to request redaction.

3 THE COURT: I don't want to hear -- I'll just tell
4 you right now I don't want to hear any confidential
5 information right now.

6 MR. LUPKIN: Okay.

7 THE COURT: So don't --

8 MR. GOLDEN: So I won't refer to it other than to
9 say that it is an exhibit --

10 THE COURT: Why don't you just explain how it fits
11 into your argument? It's what in your view nonprivileged
12 information between what parties?

13 MR. GOLDEN: Sure. It is a communication and it is
14 representative. It is communication between two people at BGR
15 making references to discussions that the BGR people had with
16 Mr. Holiner. And it is an exhibit to one of the documents
17 that I submitted to Your Honor in our --

18 THE COURT: I don't have it in front of me. It's
19 all right. Unless it was in this letter. Was it in the
20 letters?

21 MR. GOLDEN: No. It had already been submitted as
22 part of our memorandum in opposition to Mr. Egiazaryan's
23 motion for protective order with respect to the asylum
24 materials.

25 THE COURT: Oh, okay. I don't have that in front of

1 me right now.

2 MR. GOLDEN: So what it is -- and it is
3 representative -- it's an email or a memorandum between John
4 Luff [Ph.] and Ivoca Barra [Ph.], two of the people we want to
5 depose. This one, a copy is not sent to anybody. There's a
6 reference to discussions that were had that were held with
7 Drew Holiner and they talk about their public relations
8 strategy --

9 THE COURT: Well, don't get into the topic area.
10 It's not privileged, is the point.

11 MR. GOLDEN: Yes. And so getting back to what I was
12 working through before. So there are many documents and, for
13 instance, that is a category that may very much -- may very
14 well be part of the documents that have not been provided to
15 us nor have been put on a privilege log because they occurred
16 after April of 2011. Included in that, as Mr. Lupkin said,
17 there are documents that they are asserting are privileged
18 without putting them on a log that are communications between
19 BGR and BGR. There are communications between BGR and Drew
20 Holiner. There are communications between -- Mr. Lupkin
21 didn't say this, but based on what I've seen, there are likely
22 to also be communications that include Gibson Dunn & Crutcher.

23 In most of these instances, as is typical with email
24 communications, there are sort of three or four parties.
25 Sometimes the two BGR people are talking to people and they

1 send it to a lawyer, sometimes the lawyer sends it to one BGR
2 person, and the BGR forwards it to somebody else. So
3 there's -- there are sort of a broad way -- a broad way to
4 look at those things.

5 What has not been described -- and this is the only
6 thing that could possibly be privileged -- is the
7 communication between Flemming Zulack and BGR for the purpose
8 of giving BGR legal advice. The discussions in these
9 documents and based on the ones that we have, I assume that
10 most of the ones that have not been provided are like this
11 too, are about the strategy of the public relations campaign
12 and how it affects the case. It is particularly relevant to
13 the anti-slap counterclaim because all of these discussions
14 pertain to the objectives and the motives of the lawsuit.

15 Now, the ones that we've seen so far don't say
16 anything about we have to undue the defamation that was
17 committed by Peter Zalmayev. They say all kinds of other
18 things, like we have to get asylum, we have to publish
19 articles in the home countries of the arbitrators in the
20 London arbitration, we have to do things that will enhance the
21 asylum application. That's what we're talking about.

22 Now, those materials, everything other than
23 communications between Flemming Zulack and BGR for the purpose
24 of giving BGR legal advice at one time were asserted to be
25 privileged by Mr. Egiazaryan through what they asserted to be

1 was the co-veil privilege. In fact, there was not a co-veil
2 [ph.] privilege. Co-veil is an absence of the waiver of the
3 privilege under some circumstances for purposes of public
4 relations firms, the law in the Southern District is cited in
5 case -- in our March 9 letter, do not make those things both
6 not privileged and if things that are otherwise privileged are
7 communicated to a public relations firm the privilege is
8 waived. So --

9 THE COURT: I don't want to get into the merits of
10 privilege. I just want to understand what the potential is
11 for nonprivileged documents from your point of view. I think
12 I have that sense.

13 What were your three categories again between
14 employees and the firm BGR, between BGR and Holiner --

15 MR. LUPKIN: Yes, it was -- let me --

16 THE COURT: What was the other one?

17 MR. LUPKIN: Let me repeat them again. It's
18 communications -- these are sort of broad categories --
19 communications between BGR and our firm after the subpoenas
20 were served and after we were retained, communications
21 internal to BGR reflecting instructions and advice that we
22 gave to BGR in connection with the collection of documents
23 among other things and in terms of responding to the subpoena.
24 And then the last category are communications with Mr. Drew
25 Holiner about -- in anticipation of litigation or as part of

1 the litigation.

2 Remember, we're not just talking about the
3 attorney/client privilege; we're also talking about the work
4 product doctrine. And the work product doctrine waiver is
5 substantially -- the ability to wai -- the ability to
6 communicate with somebody without waiving the work product
7 privilege is substantially greater than with a strict
8 attorney/client privilege.

9 THE COURT: Okay. Well, you know, I kind of come
10 back to where I was which is, you know, I don't want law firms
11 to have to do privilege logs about their internal
12 communications and communications with their clients. And,
13 again, that's normally why agreements like this are made. So
14 I -- none of this is that. Well, it is that, but it's only
15 that because for whatever reason BGR decided to hire the same
16 law firm as the plaintiff. And I'm willing to hear some
17 methodology for lessening your burden but right now it seems
18 to me that any communication since BGR is an important
19 player -- strike that. Since BGR's documents are agreed to by
20 both parties as being relevant here, there has to be a
21 mechanism to allow the defendant to check claims of privilege
22 and I can't say it's impossible that there are going to be
23 nonprivileged or non-work protected documents in these
24 categories that you mentioned.

25 So my order right now is to do a log for these

1 documents. If there's some way you can think of to lessen
2 your burden for the documents that were, you know, purely,
3 here's a copy of our motion on your behalf -- I'm not sure you
4 have to -- did you ever file anything on behalf of BGR in this
5 court? I don't think you did now that I think about it.

6 MR. LUPKIN: I don't believe so.

7 THE COURT: Yeah. I mean, if you can think of some
8 method to lessen the burden by grouping some things, talk to
9 Mr. Golden first. You know, I'm willing to be reasonable
10 about it, but my having read your letters and heard the
11 arguments today I think these materials have to be logged.

12 MR. LUPKIN: Let me then say this. It seems to me
13 that if it is appropriate for us to be logging communications
14 of this sort with "key players" we have to look at the
15 defendant because I think what we've done is the open the
16 Pandora's box. The defendant has no fewer than four separate
17 law firms defending him, investigating matters, speaking to
18 witnesses, not necessarily communications between the lawyers
19 or between the lawyers and Mr. Zalmayev, but communications
20 with potential witnesses. Is Mr. Golden going to agree to log
21 all of those documents as well? It seems to me that there
22 should be reciprocity.

23 THE COURT: Well, I'm not asking you to log your
24 documents with potential witnesses. BGR is the subject -- the
25 BGR documents are the subject of a document request. I'm not

1 asking you to log your communications with your clients. I'm
2 not asking your client to log their communications with other
3 law firms or with Holiner, so that's not the road we're going
4 down. And if you send them down that road then you're going
5 to be sent down that road. This is an entity that is within
6 the control of the plaintiff that has responsive documents,
7 documents responsive to a Rule 34 request, and who has an
8 ongoing role apparently in relation to issues that are the
9 subject matter of this case.

10 So think -- you know, I know you're concerned but --
11 and I'm not going to hear any new requests now anyway, but
12 before you try to present something to me, just think about
13 the fact that to my mind this is narrow and whatever box I
14 heard you just mention would actually open up additional boxes
15 for you, so why don't you hold off on that application?
16 That's my suggestion. If you want to make it to me in
17 writing, that's fine. Okay.

18 I have two more items of business and then I'm
19 willing to hear from you, too. One is I want to set a date
20 for oral argument on the asylum matter. I don't know if you
21 have calendars here.

22 MR. LUPKIN: It was confiscated downstairs.

23 THE COURT: You have yours apparently. Well, I'll
24 set it and then if it has to be moved, it will be moved.
25 Yeah. I've got some bad September dates coming in. You know

1 what? Maybe day after Labor Day offhand sound available?

2 MR. LUPKIN: What day is that, Judge?

3 THE COURT: The 4th.

4 MR. LUPKIN: Would it be possible to do it two days
5 after Labor Day?

6 THE COURT: The 6th?

7 MR. LUPKIN: Yeah.

8 MR. GOLDEN: Well, the 5th would be two days
9 after --

10 THE COURT: Oh, two days after Labor Day, the 5th.
11 Maybe. You prefer that?

12 MR. LUPKIN: I would. Or perhaps even that Friday.

13 THE COURT: Friday, can't do it. All right. Let's
14 think about the 5th. I'll issue a separate order and if it's
15 a problem, you know, we can always move it.

16 MR. LUPKIN: Um-hum.

17 THE COURT: Let me think about this. September is
18 just a mess the whole month. October is great. Let's see
19 what we can do on the 5th. I'll issue an order. If I
20 suddenly change it to October, don't be surprised.

21 Okay. Last issue is, there was a letter dated
22 August 23rd from Mr. Zauderer to Judge Castel. Judge Castel
23 has asked me to deal with the request made in this letter.
24 Maybe we should go off the record.

25 (Off the record.)

1 THE COURT: Okay. We're back on the record. I
2 encouraged the parties to talk settlement with each other. If
3 both sides think it would help to have a settlement
4 conference, I'm willing to do that.

5 I want to talk about remaining discovery. I know we
6 have the Google subpoena. I know we have the asylum
7 application. I know we have whatever is going to happen in
8 London. What else is out there starting with plaintiff?

9 MR. LUPKIN: Yes. The only other thing that we have
10 extent are both a motion in the District of Columbia
11 pertaining to Public Strategies. It's another public
12 relations firm. And we're litigating about whether or not
13 they complied with the Court's order to produce privilege --
14 you know, non-privilege relevant documents and produce pri --
15 complete privilege log. And we also have extent in that same
16 district a motion to compel them to provide a date certain for
17 an individual by the name of Greg Hitt [Ph.].

18 THE COURT: And isn't this the one where they're
19 trying to get a stay so they can come to me on something?

20 MR. LUPKIN: That's the one.

21 THE COURT: Okay.

22 MR. LUPKIN: So I --

23 THE COURT: Anything else left from your point of
24 view?

25 MR. LUPKIN: Just some follow-up items. And we

1 would like to consider whether or not we need to serve request
2 for admissions or interrogatories.

3 THE COURT: Interrogatories? You mean, like
4 contention interrogatories? What interrogatories?

5 MR. LUPKIN: Yeah. Contention interrogatories.

6 THE COURT: Contention interrogatories?

7 MR. LUPKIN: Yeah.

8 THE COURT: Okay. Just asking.

9 From your point of view, Mr. Golden?

10 MR. GOLDEN: Other than what Your Honor mentioned,
11 we still need to take the deposition of Surian [Ph.]
12 Egiazaryan, whose deposition was scheduled for sometime in May
13 and was postponed because he was ill. In addition, to that --

14 THE COURT: This is a brother or something?

15 MR. GOLDEN: This is a cousin.

16 THE COURT: Cousin. Okay.

17 MR. GOLDEN: Yes. So -- and we're still waiting for
18 information on the state of his health so that we can schedule
19 that.

20 Other than that, it is follow-up discovery that
21 would be suggested by the asylum application. Once that issue
22 is resolved then we can talk to the people who are mentioned
23 in the asylum papers.

24 THE COURT: Yes. Well, I wouldn't hold out too much
25 hope on additional discovery.

1 Okay. Well, given that we have things going on in
2 London and D.C. completely outside my control and since I have
3 a terrible September, I think I am going to adjourn the oral
4 argument on the asylum application and probably the Google
5 application until that first week in October. So I'll figure
6 out a date and just send you an order and if you need to
7 change it, you let me know.

8 MR. LUPKIN: Okay.

9 THE COURT: I think that's probably it from my end.
10 Mr. Lupkin, anything else?

11 MR. LUPKIN: No, Your Honor. Thank you.

12 THE COURT: Mr. Golden, anything?

13 MR. GOLDEN: We -- with Your Honor's comments we'll
14 have to extend discovery schedule. I'll send Your Honor --
15 unless you want to do that now I'll send --

16 THE COURT: Well, I mean, my -- right now we have a
17 discovery cutoff, right?

18 MR. GOLDEN: Yes. September 18th.

19 THE COURT: Okay. And is there experts built into
20 that or no one is hiring experts?

21 MR. LUPKIN: That's before experts.

22 THE COURT: That's -- okay. Anyone hiring experts?
23 You --

24 MR. LUPKIN: We intend to.

25 MR. GOLDEN: Haven't made a decision.

1 THE COURT: Okay. But presumably we'd have to wait
2 for London and Decision Strategies (sic) anyway, right, before
3 we did experts?

4 MR. LUPKIN: Yes.

5 MR. GOLDEN: Yes.

6 THE COURT: Okay. I mean, I think what I want to
7 make clear and if I didn't already make clear is there's not
8 going to be any new discovery requests. I understand
9 Mr. Golden wants to be able to make an application based upon
10 any newly-obtained information from the asylum application,
11 but that's going to be dealt with on its own terms. Have I
12 previously said, you know, no new discovery requests or that
13 hasn't happened yet?

14 MR. LUPKIN: That hasn't happened yet.

15 THE COURT: Okay. So I think if there's going to be
16 discovery, I don't want to extend this out on the theory that
17 people can come up with new ideas for discovery requests that
18 are independent of these few remaining items like the London
19 depositions, and the BGR documents, and Decision Strategies,
20 and the asylum application.

21 MR. LUPKIN: You mean, Public Strategies.

22 THE COURT: Sorry. Public Strategies. Thank you.

23 MR. LUPKIN: That's another company.

24 THE COURT: I know. And the asylum application. So
25 did anyone have any plans to make discovery requests apart

1 from things that arose out of those?

2 MR. LUPKIN: No, apart from the potential for
3 contention interrogatories and request for admission.

4 THE COURT: Okay. How about your side?

5 MR. GOLDEN: Other than what I said, we have no
6 other intentions.

7 THE COURT: And what you said was that if something
8 arose out of the asylum application.

9 MR. GOLDEN: Yes.

10 THE COURT: Okay. So that's clear. No new
11 discovery requests other than things that may arise from
12 outstanding requests.

13 MR. LUPKIN: I.e., follow-up for --

14 THE COURT: No new requests other than applications
15 to take requests that were engendered from information learned
16 in response to these outstanding requests.

17 MR. LUPKIN: Right. There are -- correct. And
18 there's a couple of follow-up items in terms of document
19 production. It's not as --

20 THE COURT: Previous requests that haven't been
21 fully complied with.

22 MR. LUPKIN: Right. Okay.

23 THE COURT: Yes. I think people should bring those
24 to my attention as soon as possible.

25 MR. LUPKIN: Okay.

1 THE COURT: But I'm talking about new requests for
2 discovery, not applications regarding preexisting discovery.

3 MR. LUPKIN: Okay.

4 THE COURT: Though, those should be made soon, in my
5 mind.

6 MR. LUPKIN: Right. Let me actually --

7 THE COURT: So hold on. So with that in mind,
8 extending the discovery deadline to me is not terribly
9 meaningful. In my mind, it's over with the exception of what
10 I just said and I'm going to wait to hear reports on D.C. and
11 London. I'll have -- hopefully have my pieces done by the
12 beginning of October. And then once we get the reports, we'll
13 set dates for expert deadlines and it's possible if they're
14 taking too long that I'll say, tough luck, hire experts based
15 on the current record.

16 MR. LUPKIN: Okay.

17 THE COURT: I mean, do you need London and D.C.
18 for -- I know you don't need the asylum application. What do
19 you need to do --

20 MR. LUPKIN: Well, I personally don't need the BGR
21 documents or the depositions --

22 THE COURT: Right.

23 MR. LUPKIN: -- to --

24 THE COURT: You don't need any of this to do your
25 expert.

1 MR. LUPKIN: That's correct, but I don't want to be
2 on a different track than Mr. Golden.

3 THE COURT: No. I understand. But there's probably
4 going to come a point where I'm not willing to wait for London
5 and we'll just say, tough. We've got to move this case along
6 and we're going to have both sides' experts.

7 MR. LUPKIN: Um-hum.

8 THE COURT: Or D.C. I might not be willing to wait
9 for them either.

10 MR. LUPKIN: Perhaps -- may I suggest that we sort
11 of abide the event for a little bit and --

12 THE COURT: Yeah, yeah. I'm willing to wait a
13 little bit especially since I'm not willing -- I really can't
14 get to your stuff until the beginning of October anyway, so
15 after the oral argument with the time, we'll make some of
16 these decisions and I'll give you at least, you know, 30 days
17 to do your expert report from whatever date I say it's now
18 over, I'm not waiting any longer, okay?

19 MR. LUPKIN: Maybe 60 days because --

20 THE COURT: Sixty? What kind of expert are you
21 hiring?

22 MR. LUPKIN: Well, there could be -- a lot of them
23 are going to have to do with Russia and so it's going to be a
24 little difficult logistically.

25 THE COURT: You should start getting to work on it,

1 then.

2 MR. LUPKIN: Okay.

3 THE COURT: How many days are you going to need for
4 rebuttal reports? I'm giving you the same --

5 MR. GOLDEN: Without --

6 THE COURT: I'm going to give you the same time
7 period.

8 MR. GOLDEN: Yes. And, Your Honor, without seeing
9 or having any idea what the report is, I don't know, but 30
10 days probably is sufficient or 60 days if they have 60 days to
11 prepare.

12 THE COURT: Well, I'm not guaranteeing 60. We can
13 talk about it when you know who you're hiring. I guess
14 there'll be some very happy historians.

15 MR. LUPKIN: Your Honor, there was one other item I
16 just wanted to mention which I neglected to mention and that
17 is, we had served a subpoena to take the deposition of Leonid
18 Komarovski [Ph.] long time ago that was cancelled. We
19 never --

20 THE COURT: Third-party subpoena?

21 MR. LUPKIN: He was a third-party subpoena.

22 THE COURT: Okay.

23 MR. LUPKIN: It's out there. We don't know whether
24 we want to actually take it or not take it, but we'd like the
25 option to do so if it's necessary.

1 THE COURT: Okay. Well, I think you should do it --
2 what's to prevent you from doing it by the current discovery
3 deadline?

4 MR. LUPKIN: His availability.

5 THE COURT: Okay. Well, I think you should fulfill
6 it by the current discovery deadline and if you can't write me
7 a letter, all right?

8 MR. LUPKIN: Okay.

9 THE COURT: Anything else, Mr. Golden?

10 MR. GOLDEN: I'm just wondering since we're all here
11 since I could hear from Mr. Lupkin and Mr. Cohen on Suriat
12 Egiazaryan's health so we know when that deposition might be
13 taken.

14 THE COURT: Yeah. I'd like to have that taken by
15 the deadline if possible, too.

16 MR. LUPKIN: Mr. Egiazaryan, we've been advised, has
17 a liver and heart condition and his doctor at least last time
18 we checked has counseled against putting him in a situation
19 where he has -- where he's going to experience either physical
20 or psychological stress. And given --

21 THE COURT: So this is never going to end. This is
22 permanent.

23 MR. LUPKIN: That -- I can't represent that because
24 I don't know what the situation is precisely, but we can
25 certainly find out and follow up.

1 THE COURT: Yeah. I think we might need something
2 from the doctor.

3 MR. LUPKIN: Okay. That's fine.

4 THE COURT: Something detailed. So why don't you
5 get that in the next couple of weeks to the other side?

6 MR. LUPKIN: Okay.

7 THE COURT: And you can let me know if there's some
8 further application.

9 MR. LUPKIN: Thank you.

10 THE COURT: Anything else, Mr. Golden?

11 MR. GOLDEN: Nothing else.

12 THE COURT: All right. Thank you, everyone.

13 ATTORNEYS: Thank you, Your Honor.

14 * * * * *

15

16

17

18

19

20

21

22

23

24

25

1 I certify that the foregoing is a court transcript
2 from an electronic sound recording of the proceedings in the
3 above-entitled matter.

4 
5

6 Ruth Ann Hager, C.E.T.**D-641

7 Dated: August 29, 2012
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25